88-1878 (3)

Supreme Court, U.S.
FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

CHARLES WILLIAM DAVIS,
Respondent.

APPENDIX B TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1989
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IN THE UNITED STATES COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

CHARLES WILLIAM DAVIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. CIV-86-1202-W
	)	
GARY MAYNARD, WARDEN, OKLAHOMA STATE PENITENTIARY, and ROBERT H. HENRY, Attorney General of Oklahoma,	)	
	)	
Respondents.	)	

ORDER

This matter comes before the Court on the Petition for Writ of Habeas Corpus of the petitioner, Charles William Davis, filed pursuant to title 28, section 2254 of the United States Code and on the petitioner's Motion for

Evidentiary Hearing. The respondents, Gary Maynard, Warden, Oklahoma State Penitentiary, and Robert H. Henry, Attorney General of Oklahoma, have submitted argument and authority in opposition to both the petition and the motion and based upon the parties' submissions and as set forth herein, the Court finds that the petitioner is not entitled either to an evidentiary hearing or to the relief requested in his petition.

Petitioner Davis was charged by information filed on August 15, 1977, with two counts of murder in the first degree in the deaths of Robert Wayne Jones and Dennis Lee McLaughlin. In February 1978 he was tried by The Honorable David M. Cook, District Judge of Oklahoma County, Oklahoma, and was

convicted by a jury on both counts. State v. Davis, Nos. CRF-77-2905, CRF-77-2906. The jury recommended a sentence of death on each count on February 28, 1978, and the judgments and sentences of death imposed by the trial court on March 16, 1978, were appealed to the Oklahoma Court of Appeals on September 18, 1978.

The state court denied the appeal on May 9, 1983, and affirmed the petitioner's convictions. Davis v. State, 665 P.2d 1186 (Okla. Crim. 1983). On June 20, 1983, the state court denied the petitioner's request for rehearing and a Petition for Writ of Certiorari was thereafter lodged with the United States Supreme Court. The Supreme Court denied the writ on October 3, 1983. Davis v. Oklahoma, No. 83-5183

(October 3, 1983).

Petitioner Davis also made application on March 7, 1984, for post-conviction relief to the District Court of Oklahoma County, Oklahoma. The application was denied by The Honorable William R. Saied, District Judge for Oklahoma County, Oklahoma, on December 28, 1984, and an appeal from this decision was taken to the Oklahoma Court of Criminal Appeals on January 25, 1985. This appeal was denied on March 21, 1985. Davis v. State No. PC-85-55 (March 21, 1985). Petitioner Davis thereafter filed a second Petition for Writ of Certiorari with the United States Supreme Court and it likewise was denied. Davis v. Oklahoma, No. 84-6778 (March 31, 1986).

In the instant Petition for Writ of

Habeas Corpus, the petitioner has raised the following grounds as error warranting relief:

(1) the jury was precluded from considering mitigating evidence pertaining to sympathy in violation of the eighth and fourteenth amendments;

(2) the state's failure to provide funds for psychiatric assistance violated the petitioner's sixth amendment right to effective assistance of counsel, his eighth amendment right to individualized sentencing and his fourteenth amendment rights to due process and equal protection of the laws;

(3) jurors Helen Metivier and Christine Musgrave were excused in violation of the petitioner's eighth and fourteenth amendments rights;

(4) the prosecutor made improper comments in the closing argument of the second stage;

(5) the application of one aggravating circumstance to this case violated the petitioner's fourteenth amendment right to due process and the eighth amendment's prohibition against cruel and unusual punishment;

(6) the jury instructions in the sentencing phase unconstitutionally shifted the burden of proof to the petitioner;

(7) the jury instructions in the sentencing phase were confusing and ambiguous and failed to explain the jury's duty to weigh mitigating and aggravating circumstances and failed to inform the jury of its right to recommend a sentence to life;

(8) the jury's instructions as a whole unconstitutionally shifted the burden of proof to the petitioner;

(9) the application of the death penalty to this petitioner is erroneous and arbitrary; and

(10) jurors Samuel Hearst, Modena Dragus and Betty Ann Rockel were excused improperly for cause.

The parties have agreed that the foregoing grounds have been exhausted by the petitioner in the state courts and for that reason, this Court has jurisdiction over this petition. Rose v. Lundy, 455 U.S. 509 (1982). In reviewing the grounds advanced by the petitioner and in particular those grounds regarding the state's failure to appoint a psychiatrist, the application of one aggravating circumstance in this

case and the application of the death penalty to this petitioner, the Court finds such grounds to not warrant review by evidentiary hearing. The burden is on the petitioner to demonstrate the necessity for such a hearing and if the merit of the petitioner's claims can be determined from the record, a hearing is not required. E.g., Townsend v. Sain, 372 U.S. 293 (1963); Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986).

In the instant case the parties have submitted the transcripts of the trial and of the pretrial motions and have submitted the record from the Oklahoma Court of Criminal Appeals. The Court finds this to be sufficient from which to evaluate the merits of all of the petitioner's claims for relief without

augmentation through an evidentiary hearing.

The Court finds further in discussing these claims for relief that it is unnecessary to recite in detail the events giving rise to the petitioner's convictions except to state that the victims, Dennis McLaughlin and Robert Wayne Jones, were killed on August 13, 1977, by the petitioner at his apartment; that Mr. Jones, the brother of the petitioner's wife, Kathy Jones Rogers (Davis), and Mr. McLaughlin had been helping Mrs. Rogers remove her possessions from the apartment; and that the petitioner severely wounded Mrs. Rogers and a second brother, Henry Jones, at the same time.

The jury found as evidenced by the verdict forms, see Original Record at

75, 144 [hereinafter cited as Or.], that the murders were especially heinous, atrocious or cruel, that the petitioner knowingly created a great risk of death to more than one person and that the defendant had been previously convicted of a felony involving the use or threat of violence. The jury found further that these aggravating circumstances outweighed any and all mitigating circumstances and based on the same, fixed the petitioner's penalty at death by lethal injection.

The first ground advanced by the petitioner is that the eighth and fourteenth amendments to the United States Constitution were violated because the jury was instructed to disregard certain evidence introduced by the petitioner during the sentencing

stage. Such evidence included a tape-recorded statement by the petitioner of his feelings for his wife, the testimony of various witnesses who had observed first-hand the petitioner's love for his wife, the testimony of the petitioner's probation officer and the testimony of the petitioner himself. The petitioner has argued that Instruction 13 submitted by the trial court to the jury diverted the jury from its duty to consider any sympathetic aspects of the defendant's character and thus rendered meaningless the petitioner's constitutional right to introduce this evidence in mitigation of punishment. E.g., Skipper v. South Carolina, 54 U.S.L.W. 4403, 4404 (April 29, 1986)(quoting Eddings v. Oklahoma, 455 U.S. 108, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604

(1978) (accused must be allowed to present in mitigation of punishment "'"any aspect of [his] character or record and any of the circumstances of the offense . . . ."'")). The respondents have argued that sympathy for any party is not based upon evidence in the record and is therefore irrelevant to the factfinding and weighing functions with which the jury in a capital case is charged.

The jury in the instant case was instructed in the second stage in Instruction No. 6 that it should consider those enumerated mitigating circumstances as well as any and all additional mitigating circumstances it found "from the evidence in this case." Or. 63, 133. The jurors were then instructed in Instruction No. 13 that

they were the "judges of the facts" and that "[t]he importance and worth of the evidence [was] for [them] to decide," Or. 70, 140. They were further instructed that they "should not allow sympathy, sentiment or prejudice to affect [them] in reaching [their] decision" and that they "should avoid any influence of passion, prejudice or any othcr arbitrary factor when imposing sentence." Or. 70, 140.

The Court finds such instruction does not preclude consideration of any evidence regarding any aspect of the petitioner's character or record or any of the circumstances of the crimes offered by the petitioner as a basis for a sentence less than death. Such instruction does not advise the jury to avoid its dutv to consider mitigation

evidence; it instead guards against consideration by the jury of arbitrary and emotional factors not supported by the evidence and not based on the petitioner's character or record or the offense itself.

In rejecting a similar argument based upon an instruction which cautioned the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," the United States Supreme Court has stated that:

> [a]n instruction prohibiting juries from basing their sentencing decisions on factors not presented at the] trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think would be far more likely to turn the jury against a capital defendant than

> for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

California v. Brown, 55 U.S.L.W. 4155, 4157 (January 27, 1987) (quoting Woodson v. North Carolina, 438 U.S. 280, 305 (1976)).

The Court finds based upon the foregoing authority that Instruction No. 13 does not prevent the jury from consideration of compassionate evidence but only consideration of "emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase," Brown, 55 U.S.L.W. at 4156, and is therefore not constitutionally infirm.

The second ground raised by the

petitioner is that his sixth amendment right to effective assistance of counsel, his eighth amendment right to individualized sentencing and his fourteenth amendment rights to due process and equal protection of the law were violated by the state's failure to provide funds for psychiatric assistance.

The request for funds was first raised before The Honorable Stewart Hunter on the Friday before trial was to commence on Monday, February 21, 1978. The hearing before Judge Hunter was not electronically recorded and the only evidence of what occurred is reflected by the testimony given at the pretrial hearing held on Monday before the trial judge, Judge Cook. A transcript of this pretrial hearing reveals that the issue

was raised by defense counsel as one of five grounds for a continuance as follows:

> We would also ask for additional time to secure educational and psychological testing. In light of the prior mental examination that was ordered in 1942, we feel that is evidence. From talking with the Defendant we feel that educational and psychological testing is material and necessary for proper presentation of the Defense.
>
> We would add that this particular motion indicative and supported in spirit if not the letter of Judge Stewart Hunter's ruling on Friday of last week regarding educational and psychological testing should be ordered at state the Defendant if it could be done on returned prior to Tuesday. We did make an effort to have that done. It was not successful. We feel, though that this is necessary to proper presentation of the Defense in this case.

Motion Hearing, Transcript at 6 (February 21, 1978) [hereinafter H.Tr.].

In response, one of the two prosecutors

made the following statements:

> The motion that the Defense presented on Friday before Judge Hunter did not raise any question of this Defendant's sanity. The Defense asked that the Court order the providing of State funds to use in hiring expert witnesses to test this man, to test his IQ and provide psychological testing.

H.Tr. 9. Judge Hunter at the request of Judge Cook appeared at tne pretrial hearing and upon inquiry by Judge Cook, made the following statements:

> As I recall, it was a motion for funds to hire an expert witness to testify in mitigation. The gist of it being that he wanted to get a psychiatrist or psychologist to examine the Defendant and then testify in mitigation presuming the trial reached that point.
>
> My feeling was that if Defendant had sufficient funds of his own and was incarcerated, I would order him to be made available for an examination by his own private psychiatrist. I felt that an indigent should be entitled to the same thing if it is available. And my intent was to order him to be made available for an examination by a State

> psvchiatrist because there are no state funds available to my knowledge for expert witnesses in either event. My thinking was that it's not one of those things that is necessarily necessary, but it would sure be nice to have if you were a Defendant in a first degree murder case.

H.Tr. 24. Judge Cook then inquired of Judge Hunter whether he was "of the judicial opinion or not that such examination would be necessary to insure the Defendant a fair trial," H.Tr. 24, and such questioning prompted the following dialogue between Judges Hunter and Cook.

Judge Hunter: No. No, I think it is one of those things a good defense attorney would try to keep in his back pocket in case he needed it.

Judge Cook: I take it what you mean to say is that you would order him made available to whatever expert persons, expert witnesses, that the

Defendant may choose because he is in custody, is that it? As an accommodation?

Judge Hunter: Right. It was an accommodation, and I felt if the State would do it that the Defendant should be made available for the examination. And I would think that if a private physician were available, the Defendant should be made available. But I specifically ordered that it had to be done if it could be done prior to trial today without any prejudice to the trial date.

Judge Cook: But you made no judicial determination at that time concerning the matter of whether it was necessary to insure a fair trial?

Judge Hunter: No.

H.Tr. 25. At the conclusion of these statements, Judge Cook denied the petitioner's request for a continuance.

H.Tr. 25.

On direct appeal, the petitioner argued only that the state's failure had denied him the right to present mitigation evidence and had therefore deprived him of due process and equal protection of the law. The appellate court, which issued its first decision prior to Ake v. Oklahoma, 470 U.S. 68 (1985), stated that an accused had no right to state funds to hire a psychiatrist to present such evidence. 665 P.2d at 1190.

In its Order affirming the denial of petitioner's Application for Post-Conviction Relief, which was issued after the United States Supreme Court's decision in Ake, the state appellate court found that the facts of the instant case were clearly

distinguishable from the claims presented in Ake since the petitioner's sanity was never at issue in the second stages since the petitioner never displayed any mental disorders at trial and since the record reflected that the petitioner's defense to these crimes was self-defense. Order Affirming Denial of Post-Conviction Relief, Case No. PC-85-55 (Okla. Crim. March 21, 1985) at 2-3. The appellate court found further that the state offered no psychiatric or psychological evidence during the second state proceedings and thus the petitioner had suffered no prejudice. Id. at 3.

In Ake, the United States Supreme Court considered the issue of whether the federal constitution requires that an indigent defendant have access to

psychiatric assistance to enable defense counsel to prepare an effective defense based on mental condition, when sanity at the time of the offense is seriously in question. The Supreme Court held that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." 470 U.S. at 76, and "that when a defendant has made a preliminary showing that his sanitv at the time of the offense likely to be significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." Id. at 74.

The instant petitioner has contended

that psychological evaluation at state expense was necessary so evidence could have been presented during the first stage to aid defense counsel in determining whether the petitioner had a valid insanity defense and during the second stage in mitigation of punishment.

The record clearly demonstrates however that the petitioner did not make a preliminary showing that sanity at the time of the offenses was likely to be a significant factor at trial. The requested assistance was for purposes of mitigation and not to aid defense counsel in determining whether the petitioner had a valid insanity defense. Trial Transcript at 673-74 [hereinafter cited Tr.). The record demonstrates that the sole defense offered by the

petitioner was self-defense and thus, the petitioner has failed to establish that the state's failure to provide such assistance for use during the first stage warrants the petitioner's requested relief.

The second prong of the petitioner's argument is that such examination and evaluation were likewise critical in aiding defense counsel in presentation of evidence during the second stage in mitigation of punishment and in insuring that sentencing this petitioner to death by lethal injection was the appropriate punishment in this case.

As stated, the Court is aware that an accused should be afforded in the penalty phase the opportunity to present any and all relevant mitigating evidence regarding his character or record and

regarding the circumstances of the offense, Eddings, 455 U.S. at 110, and that "[c]onsideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'" 55 U.S.L.W. at 4156 (quoting Woodson, 428 U.S. at 304 (opinion of Stewart, Powell and Stevens, JJ.)). Such evidence can include testimony to rebut the petitioner's potential for future dangerousness as well as testimony to establish his mental or emotional state at the time the offenses were committed. Indeed the instant jury was instructed to consider as a specific mitigating circumstance whether the murders were committed while the petitioner "was under the influence of extreme mental or emotional disturbance," Or. 63, 133, and as a

specific aggravating circumstance whether it was probable that the petitioner "would commit criminal acts of violence that would constitute a continuing threat to society." Or. 61, 131.

In Ake, the Supreme Court recognized that in the penalty phase psychiatric testimony and assistance might likewise prove valuable and stated that "[t]he variable upon which [the Court] must focus is . . . the probable value that the assistance of a psychiatrist will. have in this area, and the risk attendant on its absence." 470 U.S. at 84. The Supreme Court reaffirmed that in those instances where the state has placed before the jury psychiatric testimony on the question of future dangerousness, the jury should likewise

be exposed to the opposing views of the accused's id., and in Ake, potential for future dangerousness was a significant factor at the sentencing stage as evidenced by the state's psychiatrist who testified that the defendant posed a threat of continuing criminal violence. Id. at 86. The Supreme Court however did not address those instances where future dangerousness was not a significant factor in the penalty stage and where the state did not present expert witnesses on the issue as here and thus this Court is left ro employ the foregoing test articulated bv the Supreme Court under the facts of this case.

In the instant case the petitioner was afforded the opportunity during the second stage to present evidence in

mitigation of punishment and to explore before the jury the petitioner's character and feelings for his wife as well as his emotional state, through lay witnesses, resulting from his wife's departure. While the petitioner has stated that he "never had an opportunity to see any type of psychiatrist despite factor about the individual that could clearly make one conclude that a doctor would have established critical mitigating evidence to save petitioner's life," Petitioner's Brief at 12 (emphasis added), and described different types of mitigating circumstances, id. at n.2, the petitioner has failed to explain or clarify the nature of this alleged ''factor." Undeveloped assertions that the requested assistance would have been

beneficial cannot operate to trigger the process whereby the state is obligated to prove such assistance and do not warrant a finding by this Court at this stage that the sixth amendment right to effective assistance of counsel, his eighth amendment right to individualized sentencing and his fourteenth amendment rights to due process and equal protection have been violated.

The third and tenth grounds advanced by the petitioner are that his sixth and fourteenth amendment rights were violated when jurors Helen Metivier, Christine Musgrave, Samuel Hearst, Modena Dragus and Betty Ann Rockel were excused for cause, over the objection of defense counsel, as a result of their responses to the trial judge's questions regarding the death penalty. The

petitioner has contended that the exclusion of these prospective jurors was prompted by the trial judge's use of a constitutionally incorrect standard and not by any ambiguities or indecisiveness in their answers.

The matter was raised on direct appeal and the Oklahoma Court of Criminal Appeals found that each of the challenged jurors had been properly excluded. 665 P.2d at 1194; see Order Affirming Denial of Post-Conviction Relief, Case No. PC-85-55 (Okla. Crim. March 21, 1985).

Judge Cook's initial question to each juror was:

> [I]n a case where the law and evidence warrant, in a proper case, could you, without violence to your conscience agree to a verdict imposing the death penalty?

Tr. 13. If a prospective juror

responded with less than a clear, affirmative answer, Judge Cook continued with the examination of. that particular veniremember. Juror Metivier answered Judge Cook's first question by stating: "I have problems with that, Tr. 289, and such response initiated the following exchange:

Judge Cook: You have problems with the Death Penalty? And I ask you a second question: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree,. and if under the evidence and the facts and the circumstances of the case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

Ms. Metivier: No.

Judge Cook: You would not inflict the Death Penalty inspite of the evidence, the law and the circumstances of the case? Do I understand you?

Ms. Metivier: Right.

Tr. 289. Defense counsel was then permitted to voir dire Ms. Metivier and the following ensued:

Defense counsel: Ms. Metivier, my question, and I am asking you, do I hear you right? Are you saying that you could never impose the Death Penalty in any case? You are not saying that under a proper case, that you couldn't consider imposing the Death Penalty?

Prosecutor: I object to the form of the question, Your Honor.

Judge Cook: The form of the question is improper. It is sustained.

Defense counsel: Ms. Metivier, you are not saying you could automatically refuse to impose the Death Penalty in any case, are you?

Ms. Metivier: No, I'm not.

Tr. 291. Whereupon trial judge asked the following question and received the following response:

Judge Cook: I ask you again: If you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The reason I repeat the question is

because you answered that you would not u n d e r a n y circumstances inflict the Death Penalty when I first .asked the question. How do you answer the question now?

Ms. Metivier: I just don't believe in taking one's life.I'm not--You know,--.

Tr. 291. Ms. Metivier was then excused for cause by Judge Cook. Tr. 292.

Juror Musgrave in response to Judge Cook's initial question stated: "I believe I could." Tr. 220. Judge Cook informed the prospective juror that such response was not sufficient and began the following voir dire of Ms. Musgrave by stating:

> I take that as being an answer tantamount to saying that you don't know. I will ask it again.
>
> In a case where the law and the evidence warrant, that is a proper case, could you, without doing

violence to your conscience, agree to a verdict imposing the Death Penalty?

Ms. Musgrave: I don't believe I could. Judge Cook: You don't believe you could? If you found beyond a doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case you would not inflict the Death Penalty?

Ms. Musgrave: No.

Judge Cook: Ma'am?

Ms. Musgrave: No. I don't think I would. Judge Cook: You would not?

Ms. Musgrave: Huh-uh.

Judge Cook: Is that a positive answer? Ms. Musgrave:

Yes, sir.

Judge Cook: Or not?

Ms. Musgrave: Yes, sir.

Tr. 220-21. Defense counsel was likewise permitted to question Ms. Musgrave.

Defense Counsel: Miss Musgrave, I believe I heard you say to that final question that: you don't think you would. Now, that--Do I hear that to mean that you could possibly impose the Death Penalty in some particular case?

Ms. Musgrave: Yes. That is right.

Tr. 221-22. Judge Cook then repeated his cuestion and Ms. Musgrave gave the following response:

Judge Cook: Well, I ask again. In this case if the law and the evidence warrant, in a proper case, if this a proper case, could you without doing violence to your conscience, agree to a verdict

> imposing the Death Penalty? I cannot accept anything short of a positive to that question, Miss Musgrave. Yes or no?

Ms. Musgrave: No. I would say no.

Tr. 222. This prospective juror was then excused by Judge Cook for cause. Tr. 223.

Juror Dragus, the third of the five prospective jurors challenged by the petitioner as being improperly excused, was questioned by Judge Cook in the following manner:

Judge Cook: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

Ms. Dragus: I couldn't do it without thinking about it. I didn't even sleep last night. I prayed all night about

it. I don't think I could do it without it bothering me.

Judge Cook: If you found--As a Juror, if you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

Ms. Dragus: I don't think I would.

Judge Cook: I must have a rather positive answer.

Ms. Dragus: I couldn't do it without it bothering me.

Judge Cook: Well, I submit, Mrs. Dragus, that judgments that all of us render, we reflect on, and as I use your words, it

bothers us. This is human nature. The Court requires a positive answer. If you are unable one, I will accept that. And - accept it as a statement by you that you don't know.

I ask the question again: If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree, and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, regardless of the facts and circumstances of the case, you would not inflict Death Penalty?

Mrs. Dragus: No, I wouldn't.

Tr. 224-25. Again defense counsel was permitted to participate in voir dire

which prompted the following objection by the prosecutor and comment bv Judge Cook.

Defense counsel: Mrs. Dragus, I believe the first time he asked you that question you said you didn't believe you could. Now, are you saying to the Court that you wouldn't impose the Death Penalty in any First Degree Murder case? Or would you just simply consider what case would be proper to impose it in?

Prosecutor: I object to the form of the question, Your Honor.

Judge Cook Yes. The form of the question is confusing. I think I have asked the question about as positive as it can be put. And the prospective Juror has answered very positively. Anything further?

Tr. 225-26. After objection by defense counsel, this juror was excused for cause. Tr. 226.

Betty Ann Rockel is the penultimate juror whose exclusion by the trial court has been advanced by the petitioner as grounds for relief. In response to Judge Cook's first question, Juror Rockel stated:

> I have been debating this in my mind. And I don't know how to answer you. I could agree on whether or not I thought the person was guilty. I do not know if I could impose the Death Penalty until it got to that point.

Tr. 227. The trial judge then asked his second question and the following exchange occurred:

Judge Cook: If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree, and if under the evidence, facts

and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and circumstances of the case, you would not inflict the Death Penalty?

Ms. Rockel: Again, I would have to say that if I thought in my mind it was a particularly heinous crime or something, and it was deserving of the Death Penalty, I think I could at that time. But I cannot positively answer you.

Judge Cook: It would depend on the law and the evidence?

Ms. Rockel: Yes.

Judge Cook: If the law and the evidence justified it under the questions I have previously asked you, and considering those questions, could you inflict the Death Penalty?

Ms. Rockel: I honestly do not know if I could or not.

Tr. 227-28. Judge Cook then determined over objection of defense counsel that Ms. Rockel should be removed for cause. Tr. 229.

The final juror whose exclusion is challenged by the petitioner is Samuel Hearst. The following is an excerpt of the voir dire of this veniremember.

Judge Cook: [I]n a case where the law and the evidence warrant, that is in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

Mr. Hearst: I believe I could.

Judge Cook: You believe you could?

Mr. Hearst: Yes.

Judge Cook: Can you answer that more specifically?

Mr. Hearst: Well--

Judge Cook: I will ask it again. In a case where the law and the evidence warrant, that is in a proper case, could you without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

Mr. Hearst: I'd still like to say that I believe I could.

Judge Cook: You believe you could? Well, in other words, I take it you mean to say that if the evidence warranted it under the law, you could do that then; is that correct?

The parties are entitled to something a little more specific.

. . . .

Judge Cook: I put the question again to Mr. Hearst. In a case where the law and the evidence warrant, that is in a proper case, could you, without doing violence to your conscience, agree to

a verdict imposing the Death Penalty?

Mr. Hearst: I think I better excuse myself.

Judge Cook: How do you answer the question? Yes or no?

Mr. Hearst: I'd have to say the same thing I said three times. I believe I could. I don't know how else to--

Judge Cook: Well, I take that to mean you don't know? At this time?

Mr. Hearst: That's right.

Judge Cook: I don't believe I can put the question any more specifically, Mr. Hearst, than I have. The Court feels that the party litigants in this case are entitled to a more definitive answer from each of you.

Tr. 138-41. Defense counsel was then permitted to participate in the voir dire.

Defense counsel: Mr. Hearst, you have heard the questions of

the Court concerning the Death Penalty. First may I ask you this: Would your scruples or. beliefs regarding the Death Penalty have any determination or affect upon you deciding the guilt or innocence of Charles Davis? If it was a two-stage proceeding and you decided guilt or innocence first and penalty second?

Mr. Hearst: I don't know how to answer that. I really don't.

Defense counsel: If you were only determining the guilt or innocence of Charles Davis in the first stage, would your consideration of the--would any scruples that you have or beliefs that you have about the Death Penalty affect your determination of guilt or innocence?

Mr. Hearst: Well, I'm really afraid I wouldn't be-

. . . .

Mr. Hearst: I wouldn't be able to inflict the Death Penalty.

. . . .

Defense counsel: Mr. Hearst, are you telling the Court that you would to impose the Death Penalty in any case? You could impose it-- Could you impose it in a case if the facts and circumstances warranted it? Could you consider it?

Prosecutor: Your Honor, I object to the form of the question.

Judge Cook: Yes. I will put the final question to the Juror. If you found beyond a reasonable doubt, Mr. Hearst, that this defendant was guilty of Murder in the First Degree, and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penaltv such that

regardless of the law, the facts and the circumstances of this case, you would not inflict the Death Penalty?

Mr. Hearst: I'm afraid that is true.

Tr. 142-44. Juror Hearst was then excused by Judge Cook for cause. Tr. 144.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court took the opportunity to clarify its decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), and to reaffirm the standard enunciated in Adams v. Texas, 448 U.S. 38 (1980), as the proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment. The Supreme Court stated that the standard to be employed

"is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. at 424 (quoting Adams, 448 U.S. at 45); e.g., Darden v. Wainwright, 54 U.S.L.W. 4734 (June 23, 1986). The Supreme Court noted that this standard

> does not require a juror's bias to be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge

> is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

469 U.S. at 424-26. The Supreme Court then stated that for these reasons, "deference must be paid to the trial judge who sees and hears the juror." Id. at 426.

The instant case, as did Witt, arises under title 28, section 2254 of the United States Code and thus, this Court is required to accord any findings of the state court on factual issues a presumption of correctness. 28 U.S.C. § 2254(d). The Supreme Court held in Witt that the determination of whether a veniremember is biased and requires exclusion is one such factual issue entitled to this presumption, 469 U.S. at 429 (predominant function in

determining juror bias involves credibility findings basis of which cannot be easily discerned from appellate record), unless one of the enumerated reasons for avoiding the presumption is present. 28 U.S.C. § 2254(d)(1)-(8).

Section 2254(d)(8) provides that a factual uetermination that is not fairly supported by the record does not qualify for this of correctness and this exception upon which the instant petitioner has relied in arguing that Judge Cook did not employ the correct standard in questioning potential jurors and in asserting that the voir dire conducted by Judge Cook was thus improper and confusing and does not support his decisions to excuse these five veniremembers.

As the Supreme Court noted "[r]evelant voir dire questions addressed to this issue need not be framed exclusively in the language of the controlling opinion." 469 U.S. at 433-34. This Court must only determine whether Judge Cook's decision that each of these five jurors' view would "prevent or substantially impair the performance of his [or her] duties as a juror," 448 U.S. at 45, is fairly supported by the record. The Court has examined each exchange and while the precise wording of such questions and the responses to each (save perhaps these responses of jurors Dragus and Hearst) do not by themselves compel the conclusion that these jurors could not under any circumstances impose the death penalty, Judge Cook was aided in his

assessment of each juror's bias not only by evaluating his or her responses but also by observing his or her demeanor and manner in responding.

Jurors Metivier and Musgrave gave confusing and conflicting answers and juror Rockel was unable to answer positively that she could impose the. death penalty under appropriate and proper circumstances. Juror Dragus while hesitant at first stated positively that she would not inflict the death penalty and juror. Hearst was equally equivocal in his beliefs before determining that he would not be able to inflict the death penalty.

This Court finds under the applicable caselaw and upon viewing the voir dire of each challenged juror as a whole, that Judge Cook's decision to exclude

each of these jurors was made after interrogation under the proper standard and that such decision is in each instance fairly supported by the record. Accordingly, grounds three and ten as advanced by the petitioner do not support his request for relief. See also Lockhart v. McCree, 54 U.S.L.W. 4449 (May 5, 1986).

The next ground advanced by the petitioner is that the remarks of one prosecutor during closing argument of the penalty phase of the trial violated his fourteenth amendment right to due process and his eighth amendment right to reliability in the sentencing process, The following statements form the basis of this contention.

> [W]e are losing the ability to become angry. Doesn't it sometimes--Don't you sometimes feel that sometimes we have got to

stand up and say no more? You know? No more.

. . . .

That that has got to stop? And you cannor commit crimes of this kind with impunity. And a life sentence for this man isn't punitive. .We tried that already. And it didn't work. . . .

I suppose you don't do it, and you pick up the morning paper in a month or a week or five years, and he has killed somebody else. How do you live with that? How do you say to yourself: You know, if I had had the courage to do what was right and what the evidence compels and what the law requires, if I had had the courage to do it then, it wouldn't have happened.

No there the distinct that by, coming saying no more, that you might deter others from this act-
-

. . . .

Suppose that you know by your judgment here and bv having the courage to stand up and say it, suppose you just deter one. person from committing this crime. Cause one person to think just a minute before they do it. Before they pull the trigger, and they won't, and the score is even.

Tr. 906-07. Defense counsel objected to the statement and moved for a mistrial. Tr. 907. The trial court denied the objections, Tr. 907, and permitted the prosecutor to continue.

On direct appeal the Court of Criminal Appeals found that the evidence had show: that the petitioner had been previously convicted of murder, that he did return from prison to kill again, not once, but twice, and that he had caused serious bodily injury to two others. 665 P.2d at 1201. The state appellate court rejected the contention that the remarks were an improper and unmistakable reference to the pardon and parole system and found that the remarks not only were derived from direct evidence presented during both stages of the trial but also fell within the

bounds of permissible closing argument. Id. The state court also found that any alleged error was waived by defense counsel's failure to request that the jury be admonished to disregard the statements since under Oklahoma law, timely objections alone do not properly preserve alleged error for appellatc review. Id.

The petitioner before this Court has claimed that these remarks unduly and improperly emphasized the deterrent effect of capital punishment and advised the jurors that they need not make the decision that the appropriate for this specific individual. In reviewing whether these statements warrant modification of the petitioner's sentence, it is not enough that the Court find that such statements are

undesirable or even universally condemned. E.g. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)(citing Cupp v. Naughten, 414 U.S. 141, 146 (1973)); see Darden, 54 U.S.L.W. at 4737-38 (comments during closing arguments in guilt-innocence state). The Court must find that the prosecutor's comments rendered the petitioner's trial so fundamentally unfair as to deny him due process or affected the sentencing decision of the jury to the extent that imposition of the sentence would be arbitrary and capricious.

As the United States Court of Appeals for the Tenth Circuit stated in Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986), because

> [d]eath is qualitatively different from all other punishments, . . .

> "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." A decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law.

Id. at 1238-39 (quoting Woodson, 429 U.S. at 305)(other citations omitted). The Tenth Circuit in addressing those subjects a prosecutor may broach during closing argument found permissible comments on a defendant's future dangerousness and chances for. rehabilitation as well as comments "concerning the penological justification for the death penalty, i.e., retribution, incapacitation, and general deterrence." 802 F.2d at 1239.

The instant remarks fall within the foregoing categories and such statements did not so infect the sentencing stage with unfairness as to make the resulting sentences of death a denial of due process. Likewise such statements did not render the sentencing state so unreliable that the sentences imposed by the jury resulted from emotional reaction and not from consideration of the evidence and circumstances in this specific case.

The fifth ground asserted by the petitioner in his Petition for Writ of Habeas Corpus is that the application of one of the enumerated aggravating circumstances in this instance violated his eighth and fourteenth amendment rights. The jury found that the murders committed by the petitioner were

especially heinous, atrocious or cruel, Or. 44, 175, and the petitioner has contended that the affirmance of such findings by the Oklahoma Court of Criminal Appeals in this case does not comply with the plurality holding of the United States Supreme Court in Godfrey v. Georgia, 446 U.S. 420 (1980).

In Godfrey, the Supreme Court had under consideration the Georgia Supreme Court's interpretation and application of the statutory aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7) (1978). The Georgia Supreme Court in earlier cases had set forth three criteria for finding that a

case involved this particular aggravating circumstance.

In Godfrey however the state supreme court affirmed without explanation the jury's finding of this particular circumstance even though the case did not meet any of the criteria previously established. It was this unexplained departure from the narrow construction of the circumstance from which the United States Supreme Court determined that the imposition of the death penalty in Godfrey was the result of caprice or emotion and required reversal. 446 U.S. at 432-33.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the

punishment will be inflicted in an arbitrary and capricious manner. In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court reaffirmed this holding and stated:

> [Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189 (opinion of Stewart, Powell and Stevens, JJ.).

> A capital sentencing scheme must, in short, provide a "'meaningful basis for distinguishing the few cases in which [the penalty is imposed from the many cases in which it is not." Gregg, 428 U.S. at 188 (quoting Furman, 408 U.S. at 313). That means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the

> crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." 428 U.S. at 196 n.47. See also Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v.Texas 428 U.S. 262 (1976). It must channel the sentencer's discretion by "clear and objective standards," Gregg, 428 U.S. at 198, that provide "specific and detailed guidance," Proffitt, 428 U.S. 253, and that "make rationally reviewable the process for imposing a sentence of death. "Woodson, 428 U.S. at 303.

446 U.S. at 427-28.

The Supreme Court in determining whether in the offense in Godfrey was "outrageously or wantonly vile, horrible and inhuman," recognized that such standard was constitutional on its face, but that there was

> nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or

> wantonly vile, horrible and inhuman."

446 U.S. at 428-29. It was the Georgia Supreme Court's departure from its obligation to keep this aggravating circumstance within constitutional bounds and to restrict approval of the death penalty to those cases that lie at the core of such circumstance that prompted the United States Supreme Court to take action. See Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976).

This Court must examine the application of the particular aggravating circumstance challenged by the instant petitioner and determine whether the Oklahoma Court of Criminal Appeals in affirming the jury's finding of such circumstance as to each victim

likewise departed from its obligation to keep such circumstance within constitutional bounds.

The instant petitioner has argued that the Oklahoma Court of Criminal Appeals has adopted a broad and vague interpretation of the phrase "heinous, atrocious or cruel," by its finding that the petitioner in this case had "perpetrated a mass-murder by inflicting multiple gunshot wounds to his victims," 665 P.2d at 1202, and thus that the instant offenses were especially atrocious. Id. at 1203. The petitioner's argument that the Oklahoma Court of Criminal Appeals has used this circumstance as catchall is based on his contention that characterization of this incident, which is at most a "domestic dispute," as a mass-murder "is

ridiculous." Petitioner's Brief at 33.

This aggravating circumstance was approved as constitutionally valid on its face bv the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), and the Oklahoma Court of Criminal Appeals adopted the definitions for such terms from the Florida Supreme Court. In the instant case, the jury was advised of these definitions. The jurors were instructed that the term "heinous" meant "extremely wicked or shockingly evil," that the term "atrocious" meant "outrageously wicked and vile," and that the term "cruel" meant "designed to inflicts a high degree of pain, utter indifference to, or enjoyment [of, the suffering of others, pitiless." Or. 65, 135.

The Oklahoma Court of Criminal

Appeals from its written opinions is aware that Godfrey requires consistent construction and application and in an effort to define those situations in which this circumstance is applicable has attempted to narrow the scope of the circumstance by considering not only the manner of killing but also the killer's attitude. Compare Odum v. State, 651 P.2d 703 (Okla. Crim. 1982) (single rendering victim immediately unconscious without evidence of physical or mental suffering, no aggravating circumstance) with Liles v. State, 702 P.2d 1025 (Okla. Crim. 1985)(victim stabbed seven times and left bleeding to death, aggravating circumstance present) and Thompson v. State, 57 Okla. B.J. 2129 (Okla. Crim. August 29, 1986) (victim severely beaten, leg broken, throat and

chest slashed and knew for some time that attackers ultimately planned to kill him, aggravating circumstance present).

While the United States Court of Appeals for the Tenth Circuit has expressed the view that the Oklahoma Court of Criminal Appeals has not been entirely consistent with regard to this circumstance, the Court finds that this case because of the events leading up to and the manner in which the instant murders were committed falls within that category of cases in which evidence of this aggravating circumstance has been appropriately and properly found. Cartwright v. Maynard, 802 F.2d 1203, 1221 (10th Cir. 1986)(even though state court has not been consistent in its, construction, departure is harmless

because once the evidence is measured against the correct standard killing in case satisfes test). The evidence revealed and the jury so found that the four victims packed and removed Kathy's personal and household belongings in the presence of the petitioner without incident, that they went back into the apartment for a final. check and were greeted by the petitioner with a gun, that the petitioner without warning began firing, that Dennis was shot twice in his head, and that Robert, who had apparently sought escape througyh, or refuse in, a bedroom, was found lying face down with his hands folded beneath him with one bullet wound in his back and one in the back of his head. The petitioner sought no medical aid for the wounded and dying but instead, in

fleeing to California, stopped first to pick up his paycheck at his place of employment and then to borrow a friend's car.

Accordingly, the Court finds that application of this aggravating circumstance is constitutionally proper in this instance and that two sentences of dcath based upon such evidence were not the result of caprice or emotion.

The sixth and seventh grounds asserted by the petitioner in support of his requested relief are that the instructions submitted by the trial court to the jury at the close of the second stage violated the eighth and fourteenth amendments in that (1) they failed to define and explain the procedure of weighing mitigating and aggravating circumstances, (2) they

failed to clearly inform the jury of its right to recommend a life sentence and (3) they impermissibly shifted the burden of proof to the petitioner to prove that his life should be spared.

Title 21, section 701.11 of the Oklahoma Statutes requires a finding of at least one of the statutory aggravating circumstances or a finding that such is outweighed by the finding of one or more mitigating circumstances before the death penalty can be imposed and the jury was so instructed. Or. 62, 132, 69, 139. Specific standards for balancing the aggravating and mitigating circumstances however were not provided but the same are not constitutionally required. E.g., Zant v. Stephens, 462 U.S. 863, 875-76 n.13 (1983) ("joint opinion issued . . . in Jurek . . .

makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required").

The Court has reviewed Instruction No. 5 which the petitioner as challenged as deficient as well as Instruction No. 12 and in viewing the instructions as a whole the Court finds that the jurors were given adequate guidance to enable them to perform the function of determining if evidence of the six enumerated mitigating circumstances existed, if any additional mitigating outweighed any circumstances existed and if such circumstances aggravating circumstances found to exist. In light of the same, the Court finds little merit to the petitioner's contention that the jurors were unable to evaluate

and process the evidence offered by the petitioner during the penalty phase.

The Court likewise finds that the jury was properly the sufficiently guided in its determination of whether death was approrpriate punishment in this specific case and that no burden was impermissibly shifted in the penalty stage to the petitioner. Accordingly, these grounds do not mandate a finding that the reliability of the death sentence in this instance is questionable.

The eighth ground advanced by the petitioner is that jury instructions as a whole violated the due process clause of the fourteenth amendment by improperly shifting the burden of proof to the petitioner in the guilt-innocence phase of the trial. The Court has

carefully reviewed the petitioner's arguments pertaining to this issue and has carefully examined each of the instructions about which the petitioner has complained and has evaluated the cumulative effect of such instructions. In so doing the Court finds that the petitioner's arguments are without merit. No burden was impermissibly shifted to the petitioner and the instructions contained no mandatory presumption. The instructions as a whole adequately and properly instructed the jury as to the law, the state's burden of proof and the petitioner's defense of self-defense. See Rose v. Clark, 54 U.S.L.W. 5023 (July 2, 1986).

In his final proposition of error, the petitioner has argued that his

rights under the eighth and fourteenth amendments were violated by the state's failure to conduct the required proportionality review since at the time of his trial and of the subsequent appellate proceedings, Oklahoma law required the state appellate court to determine "[w]hether the sentence of death [was] excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." 21 O.S. § 701.13(C)(3) (1976); see id. § 701.13(C) (effective July 16, 1985). Oklahoma law also required the state appellate court to "include in its decision a reference to those similar cases which it took into consideration." Id. §§ 701.13(E). The petitioner has argued, in the alternative, should no

review be constitutionally required, that the state nevertheless violated the petitioner's rights in that it failed to follow its own procedural rules and statutes.

The petitioner has contended that his case "is the only case wherein no cases were compared before affirmance of his death sentence." Petitioner's Brief at 53, and he has challenged the excessiveness of the sentence not only as it pertains to the appropriateness of the same in this particular instance but also as it compares with punishment imposed on others convicted of the same crime. The petitioner's argument is again premised on his theory that this case involves mere "domestic violence"'and that Oklahoma courts are reluctant to impose the death penalty in

cases involving violence of this nature. See Munn v. State, 658 P.2d 482 (Okla. Crim. 1983) (death penalty inappropriate where accused has killed a close family member without provocation and raised a reasonable doubt as to mental competency at time of crime).

The United States Supreme Court has stated that a state court, before it affirms a sentence of death, need not under the eighth and fourteenth amendments compare the sentence with the penalties imposed in similar cases, Pulley v. Harris, 465 U.S. 37, 43-44 (1984),. and noted that "[w]hile . . some form of meaningful appellate review is required," id. at 45, comparative review is not. Id. at 50.

The Oklahoma Court of Criminal Appeals on direct appeal without

including citation to those cases which it reviewed and upon which it relied did state that "the sentence of death [was] not excessive or disproportionate to the penalty imposed in similar cases after considering both the crime and the defendant." 665 P.2d at 1204. In its Order affirming the denial of the petitioner's post-conviction application, the state court found that the petitioner's complaint of disproportionality "was thoroughly treated . . . on direct appeal . . . . Notwithstanding petitioner's contention, this Court views petitioner's situation as-being more than a mere 'domestic incident,' the jury believed it was a planned murder of two unarmed men." Order Affirming Denial of Post-Conviction Relief at 2.

The type of comparative review set forth in section 701.13 has been described as "an additional safeguard against arbitrarily imposed death sentences," 465 U.S. at 50, and while citation of those cases upon which a reviewing court relies is statutorily prescribed, the absence of such citation is not so critical in this instance that its absence is violative of the petitioner's constitutional rights. The appellate court engaged, not once, but twice, in the statutory inquiry and the Court finds, under the circumstances the fact that the state court failed to list those cases it considered in making its determination does not give rise to a finding by this Court that the death penalty was arbitrarily imposed in this instance or amount to a denial of any

other constitutional rights. Furthermore this Court has reviewed. numerous other cases in which the death penalty was imposed by juries of this state and in so doing finds little merit to the petitioner's contention that the sentences of death he received were excessive or disproportionate.

Accordingly, the Court finds based upon the foregoing that the petitioner, Charles William Davis, is not entitled to the relief that he has requested in his Petition for Writ of Habeas Corpus and that his motion for an Evidentiary hearing is DENIED and that his Petition for Writ of Habeas Corpus should be and is hereby DISMISSED.

ENTERED this 31st day of March, 1987.

S/Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

Entered in Judgment Docket on 3-31-87.